

Testimony on Behalf of the New England Biotechnology Association (NEBA) and  
Connecticut United for Research Excellence, Inc. (CURE)

In support of HB6616  
An Act Concerning the Evidentiary Standard for Punitive Damage Awards

March 23, 2011

Good morning —thank you for this opportunity to speak before you today.

My name is Paul Pescatello—I'm president of CURE—Connecticut United for Research Excellence and chair of NEBA—the New England Biotechnology Association.

Both organizations advocate on behalf of biomedical research and count among our members Connecticut's leading biotechnology companies and biomedical research institutions. Our overarching goal is to grow the biotech sector, create well paying and meaningful jobs and, of course, speed the progress towards new medical treatments and cures.

I am here today to speak in favor of HB6616 – An Act Concerning the Evidentiary Standard for Punitive Damage Awards.

We support Raised Bill No. 6616, which would change the evidence required in this state for an award of punitive damages to "clear and convincing evidence," rather than a "preponderance of the evidence" standard in a number of different types of cases. A number of states have adopted the "clear and convincing" standard, recognizing that it reflects good public policy.

A fundamental principle of the American civil justice system is that damages are intended to *compensate* a claimant for injuries that *actually occurred*. Punitive damages are an anomaly, as they are awarded to punish wrongful conduct and to deter the defendant and others from engaging in similar misconduct in the future. Punitive damages are generally viewed as a windfall to plaintiffs, who are entitled to damages sufficient to compensate them for their injuries, nothing more. Punitive damages can stigmatize defendants in much the same way as a criminal conviction can, perhaps even permanently.

But even though punitive damages are "quasi-criminal" in nature, and erroneous awards can impose substantial harms on defendants, they are not subject to the types of safeguards that are present in criminal actions. While the United States Supreme Court has set forth guidelines to help assure that punitive damages awards do not deprive defendants of their constitutional due process rights, the Supreme Court also has emphasized that unless a state establishes well-considered standards for punitive damages that constrain a jury's discretionary authority, erroneous awards of punitive damages can improperly:

- Deprive a defendant of fair notice of the severity of the penalty a state will impose,
- Inflict arbitrary punishment on defendants based on a decision maker's whim or desire to retaliate against an unpopular defendant, instead of on the application of the law,
- Generate excessive and unwarranted lawsuits, multiple punitive awards, and drive up settlements in future cases, particularly when hundreds or thousands of claims are consolidated in multidistrict proceedings,
- Encourage regulation through litigation by giving a significant amount of leverage to those who prefer to use lawsuits, rather than the legislative process and experts at administrative agencies, to regulate entire industries, and
- Deter desirable and beneficial activity by defendants who are concerned about the retroactive imposition of liability and its accompanying financial risk.

We support enacting the "clear and convincing evidence" standard for punitive damages proposed by this bill. Because the defendant is not subject to incarceration and the "punishment" is more like a civil fine than a criminal sanction, this standard takes the middle ground between the burden of proof standard ordinarily used in civil cases (proof by a "preponderance of the evidence") and the criminal law standard (proof "beyond a reasonable doubt").

The "clear and convincing evidence" standard would help assure that punitive damages are awarded only in cases where they are clearly justified, and deter arbitrary and capricious awards, without interfering with the state's interest in punishment and deterrence. On a practical level, this standard would put appropriate constraints on the jury's discretion and allow trial and appellate judges to more closely scrutinize the award. On a symbolic level, it would alert jurors that they should be highly confident in their fact finding before imposing punitive damages.

This standard has been recommended by each of the principal academic groups to analyze the law of punitive damages, including the American Bar Association,<sup>1</sup> the American College of Trial Lawyers,<sup>2</sup> the American Law Institute,<sup>3</sup> and the National Conference of Commissioners on Uniform State Laws.<sup>4</sup> The United States Supreme Court has specifically

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<sup>1</sup> House of Delegates, American Bar Association, Resolution, Report No. 123 (February 16-17, 1987) ("Punitive damages should be limited to cases warranting special sanctions and should not be commonplace. ... [T]he standard of proof to be applied should be 'clear and convincing evidence' as opposed to any lesser standard such as 'by a preponderance of the evidence.'").

<sup>2</sup> American College of Trial Lawyers, Report on Committee of Special Problems in the Administration of Justice, 16-17 (1989).

<sup>3</sup> American Law Institute, Enterprise Responsibility for Personal Injury (1991).

<sup>4</sup> National Conference of Commissioners on Uniform State laws, Model Punitive Damages Act, sec. 5(2) (1996), available at <http://www.law.upenn.edu/bll/archives/ulc/mpda/pd54496.pdf> (accessed Mar. 21, 2011).

endorsed the "clear and convincing evidence" burden of proof standard in punitive damages cases.<sup>5</sup>

Enacting the clear and convincing evidence standard for punitive damages would bring Connecticut into line with the many jurisdictions that have already adopted this standard and provide a fairer environment for tort litigation in our state.

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<sup>5</sup> *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) ("There is much to be said in favor of a state's requiring, as many do, ... a standard of 'clear and convincing evidence.'")